Beverly Enterprises-Tennessee, Inc. d/b/a Allen-Brooke Healthcare Center *and* United Food and Commercial Workers Union, Local 1529, Petitioner. Case 26–RC–8043

August 22, 2000

DECISION AND DIRECTION OF SECOND ELECTION

By Chairman Truesdale and Members Fox, Liebman, Hurtgen, and Brame

This case presents the issue of whether the Employer engaged in objectionable conduct by holding a raffle for employees on the election date. In Atlantic Limousine, 331 NLRB No. 134 slip op. at 5 (2000), the Board recently adopted a new rule barring "employers and unions from conducting a raffle if (1) eligibility to participate in the raffle or win prizes is in any way tied to voting in the election or being at the election site on election day or (2) the raffle is conducted at any time during a period beginning 24 hours before the scheduled opening of the polls and ending with the closing of the polls." The Board also stated that, consistent with its usual practice, it would apply this new rule to all pending cases before the Agency.² Applying Atlantic Limousine, we agree with the hearing officer's recommendation to sustain the Petitioner's Objection 5, which alleges that the Employer's raffle interfered with the election. We reach this conclusion for the reasons set forth below.

The evidence shows that the Employer posted signs announcing that a "Grocery Cart Raffle" would be held on the day of the election. Employees were informed that raffle tickets would be handed out by Renee Darling, the Employer's human relations/payroll manager, during both sessions of the election and that the two winners of the raffle would each receive a grocery cart with \$234 worth of groceries. In large, bold letters the flyer stated, "This [\$234] is an approximate amount of a year's worth of UNION DUES!" During the morning session of the split-shift balloting from 7–7:30 a.m., Darling, stationed

herself near the Employer's reception desk, some 200–300 feet from the area where the voting took place, and distributed raffle tickets to employees as they came to work. Employees did not have to write their names on the numbered tickets.

At the afternoon voting session held from 2:30–3:30 p.m., the employees lined up in the front dining room of the Employer's facility, some 200–300 feet from the polling place. At that time, as is the custom on payday, they received their paychecks from Darling in the dining room and signed the ledger acknowledging receipt. The Employer, at the same time that it distributed paychecks, also handed out raffle tickets to all employees receiving paychecks. It is possible that some employees received raffle tickets during both the morning and afternoon voting sessions. The day after the election the Employer awarded two prizes, each worth \$234 in groceries.

Applying Atlantic Limousine, we conclude that the Employer's raffle constituted election interference. The Board in that case defined the term "conducting a raffle" as, inter alia, "distributing raffle tickets" during the proscribed period stated above. The Employer in this case clearly violated this proscription by dispensing raffle tickets to employees throughout the balloting. In addition, because the raffle tickets were distributed on election day at the Employer's facility, eligibility to participate in the raffle was clearly conditioned on being at the election site on election day. Thus, the Employer's raffle violated both "prongs" of the Board's rule concerning election-related raffles. Accordingly, on this basis, we affirm the Regional Director's recommendation to sustain the Petitioner's Objection 5 and to direct a new election.3

Because there were no exceptions filed to the hearing officer's recommendation that the irregularly marked challenged ballot be recorded as a "No" vote, it is certain that the Petitioner cannot receive a majority of the ballots cast in this election.⁴ Accordingly, we shall direct a second election.

[Direction of Second Election omitted from publication.]

MEMBERS HURTGEN AND BRAME, dissenting.

Based on our dissenting opinion in *Atlantic Limousine*, 331 NLRB No. 134 (2000), we disagree with the majority's finding that the Employer engaged in objectionable conduct by holding an election raffle. We continue to subscribe to *Sony Corp. of America*, 313 NLRB 420 (1993), in which the Board applied the long established

¹ Pursuant to a Stipulated Election Agreement, an election was held November 12, 1998, in a unit consisting of all full-time and regular part-time certified nursing assistants, housekeeping employees, laundry employees, dietary employees, and maintenance assistants employed by the Employer at its Allenbrooke Healthcare Center in Memphis, Tennessee; excluding all other employees, including registered nurses, licensed practical nurses, activities department associates, social service associates, therapy associates, medical records clerk, central supply clerk, registered dietitian, diet tech, maintenance supervisor, department heads, office clerical employees, receptionists, professional employees, guards, managers, and supervisors as defined in the Act. The tally of ballots shows that, of approximately 96 eligible voters, 42 cast votes for, and 42 against, the Petitioner, with 2 determinative challenged ballots.

In the absence of exceptions, we adopt, pro forma, the hearing officer's recommendations to overrule the challenges to the irregularly marked ballot and employee Mark Kane's ballot, as well as the Petitioner's Objections 1–4 and 6–12.

² Atlantic Limousine, supra, slip op. at 6, fn. 15.

³ Because we find the Employer's raffle objectionable under *Atlantic Limousine*, we find it unnecessary to pass on the hearing officer's finding that the linking of raffle ticket distribution to the distribution of paychecks was violative of the rule set forth in *Kalin Construction Co.*, 321 NLRB 649, 652 (1996).

⁴ Even assuming the remaining challenged ballot was cast for the Petitioner, the best result that the Petitioner can attain here is a tie vote. Therefore, we find it unnecessary to open and count the remaining ballot and to issue a revised tally.

multifactor test for determining whether raffles constitute election interference.

In *Sony*, the Board set forth the following principles concerning raffles:

[T]he Board has held that the conduct of a raffle does not constitute a per se basis for setting aside the election. Rather, the Board will consider all of the attendant circumstances in determining whether the raffle destroyed the laboratory conditions necessary for assuring employees full freedom of choice in selecting a bargaining representative. Some of the factors considered relevant by the Board have been whether the circumstances surrounding the raffle provided the employer with means of determining how and whether employees voted, whether participation was conditioned upon how the employee voted in the election or upon the result of the election, and whether the prizes were so substantial as to either divert the attention of the employees away from the election and its purpose or as to inherently induce those eligible to vote in the election to support the employer's position.

[313 NLRB 420, quoting *Grove Valve & Regulator Co.*, 262 NLRB 285, 303 (1982).]

Applying the test of *Sony* to the present case, we find that the Employer's raffle was unobjectionable. Thus, the raffle did not provide the Employer with the means for determining how and whether employees voted in the election. The Employer also did not condition its employees' participation in the raffle on how they voted in the election or on whether they rejected union representation. Regarding the issue of whether the prizes the Em-

ployer awarded were so substantial as to divert the employees' attention away from the purpose of the balloting, the evidence shows that two employees in a unit of approximately 96 eligible voters each received groceries valued at \$234. This means that the benefit of the raffle ticket to the participating employees was about \$5 per employee. Since the value of the raffle ticket in *Sony* was \$12.50 and the Board found that the prizes the employer granted there were unobjectionable, the Employer's raffle could not have interfered with this election under the application of the *Sony* test.

Also, we would not find that the Employer changed its method of paycheck distribution in this case simply because it distributed raffle tickets together with the employees' paychecks. The evidence here shows that the Employer issued paychecks to its employees at the same time, in the same place, and in the same manner that it always did. The distribution of raffle tickets was nothing more than a simultaneous event that had no meaningful impact on the election. Thus, even assuming that we subscribe to the Board's decision in *Kalin Construction Co.*, 321 NLRB 649 (1996), we would not find that the Employer engaged in conduct that warranted setting aside the election. Accordingly, we would overrule the Petitioner's Objection 5 and certify the election results.

¹ Member Hurtgen, in any event, disagrees with the Board's decision in *Kalin Construction* for the reasons set forth in his dissenting opinion in *United Cerebral Palsy Assn. of Niagara County*, 327 NLRB 40 (1998).

Member Brame finds it unnecessary to pass on the validity of *Kalin Construction* in the context of this case.